IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1156

ALNOA G. CORPORATION,

Petitioner,

vs.

CITY OF HOUSTON, TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALNOA G. CORPORATION petitions for a Writ of Certiorari to review a judgment of the Court of Appeals for the Fifth Circuit entered on November 23, 1977.

OPINIONS BELOW

The Court of Appeals transferred the case to its Summary Docket and did not hear oral argument. The only opinion of the Court of Appeals is a *per curiam* Order of Affirmance of the District Court with the Memorandum Opinion of the District Judge appended. The *per curiam* Order is reported in 563 F.2d 769 and is appended hereto (Appendix A, *infra,*).

JURISDICTION

(i) The judgment of the Court of Appeals sought to be reviewed is dated November 23, 1977.

(ii) A Motion for Rehearing was denied on December 22, 1977.

(iii) Jurisdiction of this Court arises under 28 U.S.C. 1254(l).

QUESTIONS PRESENTED

Questions I and II

The Complaint seeks for Plaintiff, a nonresident corporation, relief from a personal liability to the City of Houston, which has also become fixed as a lien on Petitioner's land, totaling in amount in excess of $450,000.00 imposed on it by the governing body of the City of Houston. The liability is a one time lump sum exaction. It is individual and particularized as to the Plaintiff, colorably founded on an alleged increase in value of land owned by the Plaintiff by reason of the conversion of a contiguous public street from a paved two-lane highway to a four-lane esplanaded thoroughfare. It was imposed by the governing body of the Defendant City in a proceeding individual and particular as to the Plaintiff having as its purpose the fixing of the liability and the amount thereof. The contested Order is *not* one which would be classifiable as what is sometimes known as an administrative order of general application substantially legislative in character; it is an order having all the characteristics of, and in fact greater effect than, a judgment of a court of general jurisdiction which judgment has become a judgment lien against a judgment debtor's property. The state statute under which the governing body of the City

colorably acted provides for a right of appeal therefrom "by instituting suit in any court having jurisdiction within fifteen days from the time such assessment is levied." Plaintiff seeks relief from the liability based on unconstitutionality under the Fourteenth Amendment of the state statute under which the Defendant colorably acted, unconstitutionality under the Fourteenth Amendment of the action of the governing body of the City which is contested, unconstitutionality under the Fourteenth Amendment of the particular processes and procedures followed by the City's governing body at the particular "hearing" at the conclusion of which the contested Order against Plaintiff was entered, and also challenges the factual determinations as having not only been unproved in any fact finding body but also as having been disproved by Plaintiff and as being patently and manifestly totally arbitrary and lacking none of the characteristics of legal and factual gross capriciousness. (The complaint is reproduced *infra*, Appendix B, pp. B-1 through B-27).

Question I: Is the federal court deprived of jurisdiction of this claim for relief by operation of 28 U.S.C. 1341, as has been held by the courts below whether or not there may be had in the courts of the State of Texas a "plain, speedy and efficient remedy?"

Question II: Is the remedy which may be had in the courts of the State of Texas "plain, speedy, and efficient?"

Question III

The Defendant did not answer the Complaint. The District Judge apparently took no heed that the Complaint had not been answered and impliedly by his Order overruled Plaintiff's motion to require that the Complaint be answered. The Defendant ignored interrogatories timely filed by

Plaintiff under Rule 33, FRCP, and the District Judge impliedly overruled Plaintiff's motion under Rule 37(a), FRCP, to require the service of answers to the interrogatories. Plaintiff was not permitted an evidentiary hearing; in fact, Plaintiff was not accorded any kind of oral argument or any form of personal appearance before the District Judge. App. C-6. The Court of Appeals transferred the case to its Summary Docket to be decided without oral argument under its Rule 18. Thus, Plaintiff has been denied opportunity to confront any Judge in the Federal court system with its arguments and contentions. Moreover, The Court of Appeals has declined to disturb a District Court judgment which holds the Court to be without jurisdiction because of 28 U.S.C. 1341 but also sustains a Rule 12(b)(6), FRCP, motion to dismiss for failure to state a claim for relief. (See *Bell* v. *Hood*, 90 L. Ed. 939, 327 U.S. 678 66 S.Ct. 773 (1946)).

Question III: As a result of the cumulative effect of the summary procedures occurring in both courts below, has the departure from traditional, accepted, usual and customary, and commonly accepted normal judicial procedures been such as to deprive Plaintiff of "judicial fair play", reasonable and fair opportunity to present its jurisdictional contentions, in fact, of access in a real and meaningful sense to the United States Courts?

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

(i) The United States Constitution, amendment XIV, section 1, provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(ii) 28 U.S.C. 1332 provides:

> "(a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (1) citizens of different states *** (c) for purposes of this section *** a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business ***"

(iii) 28 U.S.C. 1331 provides:

> "(a) The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, *** and arises under the Constitution, laws *** of the United States ***"

(iv) 28 U.S.C. 1341 provides:

> "The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

(v) Art. 1105b (Rev. Civ. Stats. of Texas, Art. 1105b) provides as follows:

> "Section 1. (a) That cities, *** shall have the power to cause to be improved any highway within their limits ***

"(b) ***

"(c) ***

"Section 2. ***

"Section 3. That the governing body of any city shall have the power to determine the necessity for, and to order the improvements *** and to contract for the construction *** in the name of the city, and to provide for the payment of the cost *** by the city, or partly by the city and partly by assessments as hereinafter provided.

"Section 4. That the cost of such improvements may be wholly paid by the city, or partly by the city and partly by property abutting upon the highway or portion thereof ordered to be improved, and the owners of such property, but if any part of the cost is to be paid by such abutting property and the owners, then before any such improvements are actually constructed, and before any hearing herein provided for is held, the governing body shall prepare, or cause to be prepared, an estimate of the cost *** and in no event shall more than all the cost of constructing, repairing and realigning curbs, gutters and sidewalks, and nine-tenths of the remaining cost *** be assessed ***.

"Section 5. ***

"Section 6. Subject to the terms hereof, the governing body *** shall have the power by ordinance to assess *** and to provide the time, terms, and conditions of payment and defaults *** and to prescribe the rate of interest ***. Any assessments *** shall be a first and

prior lien thereon from the date improvements are ordered, and shall be a personal liability *** against the true owners ***.

"Such assessments *** shall be a first and prior lien on the property assessed, superior to all other liens and claims except State, county, school district, and city ad valorem taxes, and shall be a personal liability and charge against said owners of the property assessed.

"Section 7. The part of the cost *** which may be assessed *** shall be apportioned among the parcels of abutting property *** in accordance with the Front Foot Plan or Rule provided that if the application of this rule would, in the opinion of the Governing Body, in particular cases, result in injustice, it shall be the duty of said Body to apportion and assess *** as it may deem just and equitable, having in view the special benefit in enhanced value to be received by such parcels and the owners thereof, the equities of such owners, and the adjustment of such apportionment so as to produce a substantial equality of benefits received and burdens imposed.

"Section 8. *** The lien created against any property and the personal liability of the owners *** may be enforced by suit in any court having jurisdiction, or by sale *** in the same manner as may be provided by law *** for sale of property for ad valorem city taxes.

"Section 9. No assessment *** shall be made until after notice and opportunity for hearing as herein provided, and no assessment shall be made against any abutting property *** in excess of the special benefits of such

property, and its owners in the enhanced value thereof by means of such improvements as determined at such hearing. Said notice shall be by advertisement *** and, additional written notice *** by depositing in the United States mail ***. If any such notice shall describe in general terms the nature of the improvements *** the estimated amount or amounts per front foot proposed to be assessed *** and shall state the estimated cost *** and shall state the time and place at which such hearing shall be held, then such notice shall be sufficient, valid and binding ***. Such hearing shall be before the governing body of such city and all owning any such abutting property *** shall have the right, at such hearing, to be heard on any matter as to which a hearing is a constitutional prerequisite to the validity of any assessment authorized by this Act, and to contest the amounts of the proposed assessments, the lien and liability thereof, the special benefits to the abutting property and owners thereof by means of the improvements for which assessments are to be levied, the accuracy, sufficiency, regularity and validity of the proceedings and contract in connection with such improvements and proposed assessments, and the governing body shall have power *** to determine the amounts of assessments and all other matters necessary, and by ordinance to close such hearing and levy such assessments, but no part of any assessment shall be made to mature prior to acceptance by the city of the improvements for which assessment is levied.

"Anyone owning *** any property assessed, *** who shall desire to contest any such assessment on account of the amount thereof, or any inaccuracy, irregularity, invalidity, or insufficiency of the proceedings or contract with reference thereto, or with reference to such

improvements, or on account of any matter or thing not in the discretion of the governing body, shall have the right to appeal therefrom and from such hearing by instituting suit for that purpose in any court having jurisdiction, within fifteen (15) days from the time such assessment is levied, and anyone who shall fail to institute such suit within such time shall be held to have waived every matter which might have been taken advantage of at such hearing, and shall be barred and estopped from in any manner contesting or questioning such assessment, the amount, accuracy, validity, regularity, and sufficiency thereof, and of the proceedings and contract with reference thereto and with reference to such improvement for or on account of any matter whatsoever. And the only defense to any such assessment in any suit to enforce the same shall be that the notice of hearing was not mailed as required or was not published or did not contain the substance of one or more of the requisites therefor herein prescribed, or that the assessments exceed the amount of the estimate, and no words or acts of any officer or employee of the city, or member of any governing body shown in its written proceedings and records shall in any way affect the force and effect of the provisions of this Act.

"Section 10. ***

"Section 11. ***

"Section 12. Said governing body shall have the power to carry out all the terms and provisions of this Act *** either by resolution, motion, order or ordinance, except where ordinance is specifically prescribed, and such governing body shall have the power to adopt *** any and all rules or regulations appropriate to the exercise of

such powers, the method and manner of ordering and holding such hearings, and the giving of such notices thereof.

"Section 13. In case any assessment shall for any reason whatsoever be held *** to be invalid or unenforceable, then the governing body *** is empowered *** and at any time to make and levy reassessments after notice and hearing as nearly as possible in the manner herein provided for original assessments, and subject to the provisions hereof with reference to special benefits. ***

"Section 14. Anyone owning *** any property *** against which such reassessment is levied shall have the right of appeal as herein provided in connection with original assessment, and in the event of failure to appeal within fifteen (15) days from the date of such reassessment, the provisions hereinabove made with reference to waiver, bar, estoppel, and defense shall apply to such reassessment."

(vi) The record of ordinances of the City of Houston reflect Ordinance No. 77-180 to have been adopted by the Defendant City on the 26th day of January, 1977. The said ordinance (see Appendix comprising a part of the Record on appeal in the Court below, pp. 55-76) provides in the material part as follows:

"Section 1. After due notice, in the manner required by law, a hearing on benefits was convened and held before the City Council at 3:00 o'clock p.m. on the fifth day of January, 1977, with respect to the permanent improvement of portions of Almeda-Genoa Road and Monroe Road as initiated by Ordinance No. 76-570, passed April 7, 1976.

"At such hearing full evidence was received as to all pertinent matters and all protests and objections were heard and carefully considered.

"Section 2. The City Council finds and declares that all proceedings with reference to the making of said improvements as herein stated has been duly and regularly had in compliance with the law and the Charter of the City of Houston, *** and all prerequisites to the fixing of the assessment liens against the properties hereinafter listed and the personal liability of the respective owners thereof, whether named or not, have been in all things performed and complied with; and said City Council further finds and declares that all persons interested have been given a full and fair hearing ***.

"Section 3. In pursuance of the ordinances and resolutions heretofore adopted and passed by the City Council of the City of Houston relating to said improvements *** and by virtue of the powers conferred and contained in *** art. 1105b of Vernon's Annotated Civil Statutes of Texas *** there shall be and there are hereby levied and assessed against the properties abutting on said portions of said highway or highways *** the hereinafter stated amounts. The description of said properties and the apparent owners thereof, respectively, and the several amounts so assessed are:

Property Owner	*Name of Addition*	*Lot No.*	*Block No.*	*Property Frontage*	*Total Assessment*
		***			
13. Thelma P. & Joan M. Head	Skyscraper Shadows Sec. 3	25 61.03' at $60.73	46	61.03	$ 3,706.35
		***			

Property Owner	*Name of Addition*	*Lot No.*	*Block No.*	*Property Frontage*	*Total Assessment*
109. Thelma P. & Joan M. Head	Houston Skyscraper Shadows Sec. 2	11 128.62' at $60.73	43	128.62	$ 7,811.09
		***			
113. Thelma P. & Joan M. Head	Houston Skyscraper Shadows Sec. 2	11 221.03' at $60.73	43	230.00	$13,967.90

***

(Item 109 is the amount of assessment of Lot 11, Block 43 for frontage and 113 is the side assessment of this same lot making a total $21,778.99. There are approximately 82 items fixing liability and liens against Petitioner in the manner as illustrated.)

"Section 4. Said several amounts, together with interest, expense of collection, and reasonable attorney's fee, if incurred, shall be and the same are hereby declared to be a first and prior lien on and against said respective abutting properties, and said amounts so assessed, together with said other items, shall be and the same are hereby declared to be personal liabilities and charges against the true owners of said properties, respectively, whether named or not, all as provided in and by said art. 1105b of Vernon's Annotated Civil Statutes of Texas ***."

STATEMENT AND BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Plaintiff alleged itself to be a corporation organized under the laws of the State of Delaware wherein is located its

principal office and place of business and Defendant to be a municipal corporation with the seat of its government in Harris County, Texas, and that the United States District Court had original jurisdiction under Title 28, Section 1332 of the United States Code, there being a controversy between citizens of different states and the matter in controversy exceeding, exclusive of interest and costs, the sum or value of $10,000.00, and also under Title 28, Section 1331 of the United States Code, there being presented substantial questions arising under the constitution and laws of the United States and Plaintiff also invoked the pendent and incidental jurisdiction of the United States District Court.

The claim for relief was dismissed by the District Court for want of jurisdiction relying on 28 U.S.C. 1341. The Complaint is admittedly lengthy, but the allegations are specific, detailed, precise and non-conclusory and can be answered readily as "denied" or "admitted".

Notice directed to Plaintiff's predecessor owner of the City Council hearing reached Plaintiff and no objections to the notice or adequacy thereof were made. The Ordinance recites a hearing was held but the Complaint alleges that no official record of the hearing was kept or maintained. The Complaint also alleges occurrences and procedures connected with and "constituting" the hearing such as would if established show that in a legal sense there was no hearing notwithstanding the recitation of the Ordinance. As stated above, Plaintiff was denied its rights to conduct discovery under Rule 33, FRCP, was denied its entitlement to have answered the Complaint, was denied an evidentiary hearing, and was denied any appearance before the United States District Judge to present its contentions, including it was denied any oral argument. The District Judge thus struck with only the complaint before him.

STATEMENT

The controversy on the merits and in an ultimate sense involves whether Petitioner is to be required to pay to the City of Houston, Texas any sum of money to reimburse the City for costs incurred and to be incurred by it in implementing its decision opposed by Petitioner to convert an existing paved public street in Houston, Texas contiguous to Petitioner's land from a paved two-lane street to a four-lane esplanaded City thoroughfare street, and if so, how much. Petitioner does not necessarily concede but it does not challenge a substantive legal principle that if the land owned by it has been increased in value, it can be required to pay to the City the amount of this increase notwithstanding the benefit conferred on it for which it is required to pay is a benefit conferred without its consent provided the imposition is by means and procedures which would pass muster under the United States Constitution. Petitioner does challenge the constitutionality under the United States Constitution of the procedures permitted by the state authorizing statute to determine the liability and the amount thereof on numerous specific and detailed grounds (both because of unconstitutional procedures directed or permitted as well as unconstitutional procedures not prevented), does challenge the liability imposed on it here also because of gross abuses and gross violations of due process which occurred in the particular proceeding to which Petitioner has been subjected and which it alleges specifically and in detail, and generally seeks relief on any grounds and on all grounds whereby it would be relieved of liability to pay any amount, in excess of the amount, determined by constitutional means, by which its land has been increased in value and thus it has had a benefit conferred upon it.

Petitioner's specific allegations as to deprivations of due process are numerous and detailed and range (by way of illustration) from its contention that the governing body of the City could not be a constitutional tribunal to decide the fact issues (see *Ward* v. *Monroeville*, 409 U.S. 57, 34 L. Ed.2d 267, 93 S. Ct. 80 (1972), and In re *Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955) to its contention that of the six members of the City's nine-member governing body who voted the liabilities against Petitioner at a council meeting held after the so-called hearing and after the so-called hearing had been closed two had not been present at the so-called hearing and one of the remaining four who had been present told the others without being challenged that they were voting to assess $1,300.00 per lot whereas the minimum amount for any one lot was $3,706.35 and the range upward from there was to $21,778.99 for Petitioner's Lot 11, Block 43.

The precise present status of the controversy is whether, notwithstanding the jurisdictional provisions of 28 U.S.C. 1331 and 28 U.S.C. 1332, the federal courts do not have jurisdiction of the controversy because of 28 U.S.C. 1341.

REASONS FOR GRANTING WRIT

Introductory Summary

1. Important and wholly unsettled questions of federal law and of federal court jurisdiction requiring interpretation of federal statutes are presented. These questions have also been decided incorrectly in the courts below.

2. The challenged state governmentally imposed liability is not a governmental liability covered or intended to be covered by 28 U.S.C. 1341 as the courts below have erroneously held. Any policy to interpret 28 U.S.C. 1341 to

extend to liabilities the same or of the nature of the challenged liability is uniquely one for adoption or rejection by the United States Supreme Court.

3. The United States Supreme Court has never considered an issue of coverage of 28 U.S.C. 1341 (what is a "tax under state law"?) other than in the context of coverage as deriving from whether the state court remedy is a qualified one, nor are there analogous precedents in the United States Supreme Court which are very directly in point.

4. The treatment by the courts below of the challenged liability as a "tax" is in conflict with the judicial principles recognized and stated in cases like *Village of Norwood* v. *Baker, infra,* declaring the substantive nature constitutionally supportable of a liability fixed against an individual tract of land based on the increasing of the value of the land by a "public improvement."

5. The only state court remedy is not a qualified remedy and the United States Supreme Court has never considered a state court remedy the same as or similar to the only Texas state remedy available to Petitioner as to whether it meets the tests of 28 U.S.C. 1341 as being plain, speedy and efficient.

6. The decision of the courts below is in conflict with the principles of *County of Allegheny* v. *Mashuda, infra,* upholding federal jurisdiction over state property condemnations. A complaint making specific allegations to be taken as true which on their face reflect factual substantiality that a liability grossly in excess of the value of any benefit received has been imposed alleges a "taking of property" and the significance of said allegations where jurisdiction is questioned under 28 U.S.C. 1341 is a matter

which warrants consideration by the United States Supreme Court. MR. JUSTICE HOLMES: "I suppose it to be plain, as my brother Brewer says, that, if an expense is thrown upon the railroad unlawfully, its property is taken for public use without due compensation." *Chicago, B. & Q. R. Co.* v. *Illinois,* 26S. Ct. 341 at page 351; 200 U.S. 561, 50 L. Ed. 596.

The questions presented for review involve important questions of federal law and jurisdiction of federal courts which have not been settled but should be settled and can only be settled by the United States Supreme Court. They also involve a decision in the Courts below of a federal question in conflict with judicial principles inherent in the decisions of *Village of Norwood* v. *Baker,* 19 S.Ct. 187, 172 U.S. 269 (1898), and *County of Allegheny* v. *Mashuda,* 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163. The decisions below are also believed and considered to be in conflict with *Louisville* v. *Nashville Railway Co.,* 423 U.S. 802 46 L. Ed.2d 24, 96 S. Ct. 10, which was an affirmance on direct appeal from the District Court, Middle District of Tennessee.

A. The courts below have erroneously applied the provisions of 28 U.S.C. 1341 to the controversy. The jurisdiction depriving effect of 28 U.S.C. 1341 is limited. First, it is limited to "taxes under state law." Even without reference to the limiting effect of the requirement of an adequate state remedy, it is limited to actions to enjoin, suspend or restrain the assessment, levy or collection of any tax under state law.

That the governmental exaction involved in this controversy is not a "tax under state law" or a "tax" at all seems apparent; however, it did not seem apparent to the courts below. Its substantive and procedural elements are inconsistent with the substantive and procedural elements

commonly associated with a "tax". It is a one-time exaction. A prerequisite for its initial imposition is a hearing. A prerequisite for its attaining finality as a liability is a disposition adverse to the obligor by a court of a contest of the obligation as initially imposed. It is an obligation individually determined and imposed and based on factual determinations of whether there has been or will be a benefit conferred on the particular person or entity affected, and if so, how much that benefit should be valued. Generally, the procedures and processes contemplated for its imposition are judicial or quasi-judicial proceedings rather than legislative-type proceedings. It is an exaction for a particular purpose, to reimburse the City for costs incurred and to be incurred by it in a particular street improvement project. In the enabling statute, the Legislature has recognized as a further condition of the taking effect of the liability that the individual involved is entitled to some form of judicial review "in any court having jurisdiction".

Liabilities arising under 1105b have been held by the highest court of the State of Texas not to be "taxes". This was recognized but considered irrelevant by the courts below. There would appear to be no valid policy considerations which would call for a federal court to treat for purposes of 28 U.S.C. 1341 the liability as a tax when the state itself does not treat it as a tax. Moreover, 28 U.S.C. 1341 states an applicability to a "tax under state law". Certainly the Congress was referring to liabilities which under state law were "taxes." The state holding that the liability is not a tax carries with it certain substantive and procedural attributes and therefore there would seem more to be called for a uniform interpretation of 28 U.S.C. 1341 with state law rather than an opposite interpretation. There is no evidence that the State Legislature identified any state purpose and interest to

have the judicial review contemplated by 1105b conducted in a state court, or in any particular state court, rather than in a federal court.

Congressional history, although seemingly meager, more points toward inapplicability than applicability of 28 U.S.C. 1341. See *Hargrave* v. *McKinney*, 413 F.2d 232, at 325-7, an early case in the Court of Appeals for the Fifth Circuit not often referred to by that court in recent years. The purposes which have been suggested for the enactment of 28 U.S.C. 1341 are not served by holding it applicable to the instant liability. The concern of Congress was with the opportunities for foreign corporations to avoid or withhold payment of taxes by resort to federal courts whereas resident corporations and citizens were not accorded the same remedies in the state courts. The enabling act here contemplates as a prerequisite for finality at least the securing of a final judgment of a court declining to set aside the determination of liability by the governing body of the City. This remedy is granted equally to residents and nonresidents. Thus there is inherent in the process that the liability cannot be collected until a judgment adverse to the landowner has become final against it. Discrimination as to remedies between residents and nonresidents is not possible. The liability of one landowner under 1105b is entirely separate from all other landowners since the issues as to whether he has a liability because his particular tract of land is benefited, and if it is benefited, how much, are separate and individual as to each tract of land and each owner and involve individual determinations as to each tract of land and as to each owner. It is relatively clear that the Congress had in mind taxes having a wide general application to taxpayers, or at least classes of taxpayers constitutionally and rationally identified as to application of a proposed tax. It also seems clear Congress was thinking of "tax liabilities" imposed legislatively by a legislative body

proceeding legislatively, not liabilities imposed judicially or quasi-judicially. Congress also made the point that the evil sought to be cured was the ability of foreign corporations by resort to federal courts to withhold from states and their subdivisions taxes resulting in a disruption of state, city and county finances unless the taxing entity chose to compromise the liability in order to secure more timely payment. This purpose is not applicable here not only because the enabling statute contemplates that all affected landowners can withhold until their liability is the subject of a final judgment in a court but also because the exaction is one the collection of which by the city is always at risk, at least to some extent, until a final judgment refusing to set aside the exaction is entered and in the meantime the city proceeds with this risk present, presumably with funds contingently budgeted to pay for the work out of general revenues.

Although it has been held that 28 U.S.C. 1341 is not to be limited in its scope to pure complaints for injunctions or the substantial equivalent thereof but extends to actions for declaratory judgment to declare tax statutes invalid, nevertheless it has been held that the statute does not extend to suits for refund of taxes allegedly illegally assessed and collected, a kind of case where essentially the same considerations pointing to nonapplicability of 28 U.S.C. 1341 are present as are present in this case before the Court. *Louisville and Nashville Railway Co.* v. *Atkins*, 423 U.S. 802 96 S. Ct. 10, 46 L. Ed.2d 24, noting "appeal from the United States District Court for the Middle District of Tennessee, judgment affirmed". See also *Georgia Pacific Corp.* v. *County of Mendocino*, 515 F.2d 285 (9th Cir. 1974).

It is important to federal law and to the law generally that the applicability of 28 U.S.C. 1341 to governmentally created liabilities the same or similar to the liability here involved be settled. In this connection, there are some matters which

attorneys and litigants come to consider settled by decisions in the circuit courts because of the quality of the opinions rendered by the court deciding the case. It would seem a reasonable conclusion that the opinion of the Court of Appeals for the Fifth Circuit in *Tramell* v. *Schrader*, 505 F.2d 1310 (1975), and its action in this case before the Court as much invites additional efforts to invoke federal jurisdiction in such cases as it has an operative effect to deter such efforts.

Consideration by the United States Supreme Court in any context of citizen liabilities similar to the liability here contested, have been limited and there is little law to be pointed to as emanating from the United States Supreme Court which sheds much light in at least a direct or specific sense on the specific questions presented except cases like *Village of Norwood* v. *Baker*, *infra*, and the *Mashuda* case, *infra*.

No case has been found where this Court has considered, at least by published opinions, the issue of what is a "tax under state law", the issue of to what state created liabilities 28 U.S.C. 1341 may extend other than what would indisputably be a tax. On the issue of coverage (other than as deriving from adequacy of the state court remedy) the Court has only considered its application as affected by the parties before the Court, the United States itself as the Plaintiff, an instrumentality of the United States as plaintiff, or American Indian tribes as plaintiffs, relying for jurisdiction on 28 U.S.C. 1362. It would seem important that this Court grant the writ to permit a full consideration of the question as to what liabilities the statute extends if it is to be extended to liabilities other than tax liabilities. There appears to be no reason to assume that a specific purpose of 28 U.S.C. 1341 was to limit federal courts in the exercise of their traditional and primary responsibility for protecting federal

constitutional rights of United States citizens, particularly from the acts of states and their instrumentalities. The purpose of curtailing federal court intervention in state tax matters was present but the curtailing of federal court jurisdiction conferred by 28 U.S.C. 1331 was no more than an incidental result of the statutory purpose. Thus if the statutory purpose of curtailing federal court intervention in state *tax* matters, is not defeated, there should be no policy calling for a federal court to go further in foregoing the performance of its primary and historical function of protecting federal constitutional rights of citizens, particularly from governmental abuses.

Moreover, the concept of the imposition of individualized liabilities on citizens by state governmental agencies, particularly municipalities, is an expanding one, brought on by the search of cities for sources of additional revenue to perform expanded and expanding functions many of which would not until recently have been considered governmental. There is increasing involvement particularly of cities in private ventures, some ventures with private enterprise which would be "common law partnerships." There has been expansion of the character of projects as to which it does not seem to cities to be improper to undertake to require private participation and contributions, nor improper to state legislators in passing implementing legislation, and increasing necessary acknowledgment that councils and other forms of governing bodies of cities may well be more similar to boards of directors of large corporations than to traditional legislative bodies. It is naive not to recognize that governing bodies of municipalities, engaged in all manner of enterprises, function from the perspective of the promotion of the interest of the city as a corporate entity where there is a conflict with a specific interest of a specific person or entity. There is considerable evidence that liabilities of the nature of

the one before the Court were formerly principally limited to "paving assessments" and when "paving" was of relatively "low cost" in comparison with land value. Now, construction costs of streets consistent with strict municipally imposed standards are much higher in relation to land values. Use of the same procedures for effecting reimbursement from landowners now extends to installation of water mains and other water lines, sanitary sewers, curbs and gutters, and storm sewers. Cities are now invested by enabling legislation with the power to develop land within its limits which has not seen development by private owners by installing, at the cost of the owners of the land, water lines, sanitary sewer, storm sewers, curbs, sidewalks, gutters and streets all meeting current city specifications designed to eliminate or minimize future repair and maintenance expense. (See Art. 1110C Revised Civil Statutes of Texas first enacted in 1963 and further expanded in scope in 1973 extending the same procedures to water lines, storm sewers, and sanitary sewers).

If federal courts are not to have jurisdiction of suits contesting such governmental exactions under either 28 U.S.C. 1331 or 28 U.S.C. 1332, then it should be important that this be settled by the United States Supreme Court and if federal courts are to have jurisdiction, then it is at least equally important for this to be settled by this Court.

B. The holdings of the court below that a "plain, speedy, and efficient remedy may be had in the *** (state courts)" is erroneous. First, the statute provides:

> "Anyone *** owning *** any property assessed *** who shall desire to contest any such assessment on account of the amount thereof, or any inaccuracy, irregularity, invalidity, or insufficiency of the proceedings or contract with reference thereto *** or on account of any matter or

thing not in the discretion of the governing body, shall have the right to appeal therefrom and from such hearing by instituting suit for that purpose in any court having jurisdiction within fifteen days from the time such assessment is levied ***."

Notwithstanding the seeming breadth of review evidenced by the statute as intended, the Supreme Court of Texas has held that the review is to be under the "Texas Substantial Evidence Rule" and is not only not to be a trial in the normal sense of the trial of disputed fact issues but also is not even to be an "on-the-record review." The record of the proceedings before the City's governing body are thus not reviewed by any state court. There are no fact issues considered to be before the state court. The court decides on the basis of evidence heard by it, whether or not heard by the City's governing body, and as a decision of an issue of law whether to set aside the council determinations or to refuse to set aside the council determinations. There is no fact finding provided in the state court proceeding; there is of course no jury and the Judge has no jurisdiction to decide the facts. The test or tests correctly to be used in making this ultimate decision have perhaps never been clearly and plainly enunciated by the Texas Supreme Court, but whatever the test or tests are it is quite clear that the findings of the council will at least be accorded the weight of the findings of a jury and if the evidence before the court is such that the court could not direct a verdict against the City if a jury were hearing the facts heard by the Court, the court must enter a judgment for the City. This process occurs without a review of the record of the council hearing and without regard to what evidence, if any, there was before the council on which it based its findings and without regard to whether the landowner was accorded due process at the council hearing, indeed, what occurred related to the council decision whether it be alleged

to have occurred "during the hearing" or at some other time is considered totally immaterial to the decision by the court.

Directed specifically to the jurisdictional aspect which is now before the Court, the above procedure means that Petitioner is provided no remedy in state courts where it can present its contentions that at the hearing before the Council when the fact issues were decided against it it was not accorded but in fact was deprived of due process and equal protection of the laws. Additionally, it is provided with no remedy in the state courts whereby it can deprive the City of and prevent the City from receiving and enjoying the benefits of a hearing (and the benefit of the equivalent of a common law *nisi prius* judgment) at which Petitioner was deprived of and not accorded due process of law. The points as made may appear to reflect such divergence from normal due process requirements as to raise a skepticism of the correctness of the statement thereof. But, the points made are assuredly correct. For example, see Reavley (former Associate Justice, Supreme Court of Texas), *Substantial Evidence and Insubstantial Review in Texas,* 23 SWLJ 239 (1969). Somewhat oddly, the District Judge below acknowledged entitlement of petitioner to "due process" at the council hearing, but then ignored that the Texas remedy provides for no review on the record whereby it can be determined if due process was afforded.

The remedy is also not "plain, speedy and efficient" because the only judgment the court enters is a judgment setting aside particular the council determination or a judgment declining to set aside the determination, and if the determination should be set aside, then, under the statute the council may commence without limitation as to time or number new assessment proceedings.

It is to be emphasized that the charges of Petitioner extend to a charge patently possessing substantiality that its property is being confiscated, that the addition, if there is any addition, to the value of its land deriving from the street project is grossly much less than that which it has been determined it must pay, that it is subjected to a governmental taking of its property, its land and its money, without compensation. Yet, the State provides no remedy in its courts for a judgment or court order which would prevent this unconstitutional taking, which would even allow a limit to be placed on how much Petitioner could be required to pay based on judicial findings that any amount in excess would be an "unconstitutional taking".

The District Judge stated a concession that a case might arise whereby federal court jurisdiction might exist where it could be shown that a council had proceeded in a new assessment hearing ignoring the admonitions of a state court. But how is it to be determined that the Council ignored the admonitions of a state court if there is no review on the record of the proceedings of the Council, and how is it to be determined that the court admonitions were ignored if there is to be no record plainly directed by the enabling statute to be kept and made and in fact no record is kept or made.

One senses that there may have occurred after *Spector* v. *O'Conner*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951); *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1946); and *Georgia Railroad and Banking Co.* v. *Redwine*, 342 U.S. 299, 96 L. Ed. 335, 72 S. Ct. 321 (1952), the development of a policy of more strict application of the "remedies test" of 28 U.S.C. 1341 to effectuate the over-all policy of 28 U.S.C. 1341, at least a policy to find the State remedy a qualifying remedy even though it be less that the best remedy, something less than speedy, perhaps as

much obscure as plain, and perhaps less than could be desired as to its efficiency. However, the only apparent basis for this conclusion would seem to be denials of certiorari and a seeming greater deferral by federal courts to state courts in matters generally involving state law. On the question of the remedy, the only case after the *Redwine* case in which this Court appears to have spoken by decision and written opinion is *Tully* v. *Griffin*, 97 S. Ct. 219, 50 L. Ed.2d 227, and as indicated below this Court made certain there was a New York remedy by which the taxpayer could present his federal constitutional contentions without burdensome preconditions and without prejudicing his position in respect of the contest of the tax otherwise if his constitutional contentions were not sustained.

This Court in *Tully* v. *Griffin* did *not* decide that Art. 78 of the New York Civil Practice Law and Rules which required a prepayment of the administratively determined tax before resort to the State courts provided a plain, speedy and efficient remedy in a case where the taxpayer was challenging the constitutionality of the tax as applied to him but instead looked for and found an adequate state remedy which would result in a stay of the proceeding while the taxpayer litiga ed in the New York courts his constitutional claims, the stay assuring that if his constitutional claims were determined adversely to him he would still be entitled to pursue his administrative tax remedies through the completion of the administrative process and from there into the New York courts wherein as provided by Section 78 he could "challenge the amount of the tax due."

C. In respect of Question III, page 3, *infra*, it is Petitioner's sincerely held belief that the courts below have so far departed from the accepted and usual course of conduct of judicial proceedings as to call for this Court to exercise its

power of supervision provided for in such cases as contemplated by the applicable clause of this Court's Rule 19. Petitioner does not contend that any one summary procedure or any matter of which complaint is made standing alone denied Petitioner the rudiments of judicial fair play long known to our law but the cumulation thereof has had this effect, has had the effect of a total denial of access in a meaningful sense of the term to a United States Court.

PRAYER

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ WILLIAM V. COUNTS

WILLIAM V. COUNTS of
LANE, SAVAGE, COUNTS & WINN
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, William V. Counts, attorney for Petitioner Alnoa G. Corporation and a member of the Bar of the Supreme Court of the United States, hereby certify that on Feb 13, 1978, I served three copies of the foregoing petition for writ of certiorari on the respondent herein by mailing the same, postage prepaid, addressed to Mr. Robert J. Collins, Senior Assistant City Attorney and Mr. Charles Williams, Assistant City Attorney, City of Houston, City Hall of the City of Houston, 900 Brazos Street, Houston, Texas 77001. I further certify that all parties required to be served have been served.

s/

WILLIAM V. COUNTS OF
LANE, SAVAGE, COUNTS & WYNN
3330 Republic National Bank Bldg.
Dallas, Texas 75201

Attorney for Petitioner

APPENDICES

APPENDIX A

ALNOA G. CORPORATION,
Delaware Corporation,
Plaintiff-Appellant,

vs.

CITY OF HOUSTON, TEXAS,
Defendant-Appellee

No. 77-2279

Summary Calendar

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Nov. 23, 1977.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

The judgment below is affirmed on the basis of the district court's memorandum and order of dismissal annexed.

AFFIRMED.

APPENDIX

ALNOA G. CORPORATION
(A Delaware Corporation),
Plaintiff,

v.

CITY OF HOUSTON, TEXAS,
Defendant.

Civil Action No. H-77-218

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MEMORANDUM AND ORDER

I. STATEMENT OF FACTS

Plaintiff has filed suit in this Court asserting jurisdiction on the basis of diversity of citizenship, 28 U.S.C. §1332, and the existence of a federal question, 28 U.S.C. §1331. The defendant City in accordance with its powers under Article 1105b, Tex. Rev. Civ. Stat. Ann., has levied street paving

assessments against certain properties owned by plaintiff within the City of Houston. Plaintiff contends that the amount of the assessments exceeds the amount by which its properties will be enhanced by the street improvements, and that the assessments are arbitrary and capricious, depriving it of due process. Plaintiff also points to aspects of its hearing before the City Council which it says have deprived it of due process.

II. DEFENDANT'S MOTION TO DISMISS

A. 28 U.S.C. §1341

Defendant has filed a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. A motion conference held before the United States Magistrate on May 9, 1977, has resulted in a recommendation by the Magistrate that the case be dismissed.

Defendant alleges that 28 U.S.C. §1341 bars this Court from taking jurisdiction of plaintiff's cause. Title 28, United States Code, Section 1341 provides:

> "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

B. Scope of the Term "Tax"

[1] An initial question that presents itself here is whether the term "tax" as used in 28 U.S.C. § 1341 includes a special assessment for street paving. Despite plaintiff's vigorous arguments that such paving assessments are not covered by the statute, the law in this Circuit is firmly to the contrary.

The Fifth Circuit Court of Appeals held in *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975) that special street improvement assessments constituted a "tax" within the purview of the tax injunction statute (28 U.S.C. § 1341), thus requiring dismissal of suit by landowners to enjoin collection of such assessments by city officials.

The *Tramel* opinion does assume, as plaintiff points out, that the Texas law does not provide for a pre-assessment hearing. This would seem to be incorrect, inasmuch as Article 1105b, Tex. Rev. Civ. Stat. Ann., does in Section 9 (Supp. 1976) specifically provide that the amount of any assessments under Article 1105b must be determined at a hearing held by and before the governing body of the city, however, any inaccuracy on this point does not affect the validity of the *Tramel* holding on the point presently under discussion, i.e., whether a special street improvement assessment constitutes a "tax" for purposes of section 1341. This Court holds in consonance with *Tramel, supra*, that the special street improvement assessments of which plaintiff complains are taxes within the purview of 28 U.S.C. § 1341.

C. Application of Section 1341

Having determined that the assessment here contested falls within the scope of section 1341, the Court next examines the standard of applicability of section 1341.

The test for applying section 1341 was succinctly set forth in *United States Steel Corp. v. Multistate Tax Commission*, 367 F.Supp. 107, 115 (S.D.N.Y.1973). The court there said:

> "In determining whether to exercise jurisdiction in a particular case, the Court must carefully weigh two countervailing considerations set forth by the statute: (1) a long standing policy of non-interference by federal courts in state tax matters; and (2) fairness to plaintiffs, i.e., whether plaintiffs have an effective state remedy."

1. Federal Policy of Non-Interference

[2] The first factor to be considered is the federal policy of non-intervention with respect to state tax matters. The reluctance of the federal courts to inject themselves into state or local tax affairs is an oft-repeated theme in the case law of this Circuit. *See, e. g., Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965); *City of Orange v. Levingston Shipbuilding Co.*, 258 F.2d 240 (5th Cir. 1958); *Flato Realty Investments v. City of Big Spring*, 388 F.Supp. 131 (N.D.Tex. 1975).

[3] This Court shares that reluctance. For this Court to inject itself into the arena of city tax assessments would be both unseemly and, in view of the existence of state procedures for challenging such assessments, unnecessary. Thus, in the absence of any other compelling factor, the Court prefers to adhere to the federal policy of non-interference in this "very sensitive local area". *Jones v. Township of North Berger*, 331 F.Supp. 1281 (D.N.J. 1971).

2. Existence of an Effective State Remedy

The second factor to be considered in determining whether to apply section 1341 is that of fairness to plaintiff, i. e., whether plaintiff has a "plain, speedy and efficient remedy may be had in the courts" of Texas.

The Supreme Court of Texas has held in *City of Houston v. Blackbird*, 394 S.W.2d 159 (1965) that a party contesting an assessment made by a city under its article 1105b powers is

not entitled to a trial de novo on the issue of the value of benefits accruing from the improvements. Rather, the Texas Court will set aside the acts of the city council on the ground that such acts were arbitrary or were the result of fraud. *Id.* at 163.

Plaintiff contends that because such a procedure does not determine the ultimate and proper amount of the assessment, but merely nullifies the original assessment and returns the taxpayer to the mercies of the city council, there exists no adequate state remedy. With this the Court cannot agree.

[4] The state remedy need not be the best of all possible remedies. *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973). The state remedy need only be adequate, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 605, 71 S.Ct. 508, 510, 95 L.Ed. 573, 577 (1951), and not unduly burdensome, *United States Steel Corp. v. Multistate Tax Commission*, 367 F.Supp. 107 (S.D.N.Y. 1973); *see also Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952).

Plaintiff alleges in essence that the fact that the city council may issue an order of re-assessment against it renders the state remedy inadequate and will condemn the plaintiff to an unending and burdensome series of appeals of council orders. For this Court to so find would require the Court to assume that the city council would, even after having been rebuked by a state court for acting arbitrarily, ignore such admonishment and again proceed in an arbitrary fashion. This Court declines to give effect to such a presumption, but instead chooses to presume that the city council will act in accordance with tenets of good faith, due process and fairness toward all who come before it.

[5] At present, plaintiff merely raises the spectre of a series of arbitrary decisions by the council. This is not sufficient to hold the state-provided remedy inadequate. However, were such potential opportunities for abuse to become a reality, the adequacy of the state remedy might then be seriously questioned. No such case being before this Court at present, however, the Court will rely upon the unbroken series of cases in which the Fifth Circuit Court of Appeals has recognized in applying 28 U.S.C. §1341 that the taxpayer has a plain, speedy and efficient remedy in the state courts of Texas. *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975); *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965); *City of Orange, Texas v. Levingston Shipbuilding Co.*, 258 F.2d 240 (5th Cir. 1958); *Norton v. Cass County*, 115 F.2d 884 (5th Cir. 1940).

III. CONCLUSION

For the foregoing reasons, the Court finds that the statutory bar set forth in 28 U.S.C. §1341 is properly applicable in the instant case and that defendant's motion to dismiss should be granted. Accordingly, it is ordered adjudged and decreed that plaintiff's cause be, and it hereby is, dismissed for want of jurisdiction over the subject matter and for failure to state a claim upon which relief may be granted.

FINAL JUDGMENT

From a consideration of the pleadings submitted in this cause, it is the opinion of this Court that this action should be and is hereby dismissed.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 25th day of May, 1977.

/s/ CARL O. BUE, JR.
United States District Judge

APPENDIX B

ALNOA G. CORPORATION,
A Deleware Corporation
Plaintiff

vs.

CITY OF HOUSTON, TEXAS,
Defendant

Civil Action No. H-77-218

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

February 8, 1977

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE MOST HONORABLE UNITED STATES DISTRICT JUDGE:

Alnoa G. Corporation, Plaintiff, presents this its original complaint complaining of the City of Houston, Texas, Defendant:

I.

(a) Plaintiff, Alnoa G. Corporation, is a corporation organized under the laws of the State of Delaware where is located its principal office and place of business. Plaintiff does not have a place of business within the State of Texas.

(b) Defendant, the City of Houston, Texas, is a municipal corporation with the seat of its government in Harris County, Texas, where its governmental functions are performed.

II.

The United States District Court for the Southern District of Texas has original jurisdiction of all matters presented herein on either or both of the following grounds:

(a) Title 28, United States Code, Section 1332, there being a controversy between citizens of different states and the matter in controversy exceeding the sum or value of $10,000.00, exclusive of interest and costs;

(b) Title 28, United States Code, Section 1331, there being substantial questions presented herein arising under the Constitution and laws of the United States of America and the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs; further, any particular issue presented hereby which does not arise under the Constitution and laws of the United States of America is within the Court's jurisdiction as incident and pendent to the jurisdiction of this Court over the matters arising under the Constitution and laws of the United States of America, and this Court's power to grant full relief.

III.

(a) Almeda Genoa Road is a major public street, 60' of public right-of-way which runs generally in an east-west direction within the corporate limits of Defendant City.

(b) Almeda Genoa Road is presently and has been for many years an improved and paved two lane street, one lane for traffic moving in an easterly direction and one lane for traffic moving in a westerly direction.

(c) Plaintiff owns fifty-seven (57) platted lots out of a recorded subdivision which abut upon the north side of Almeda Genoa Road, the great majority of which each respectively front approximately 61 feet on the north side of Almeda Genoa Road. A few lots abutting on the north side of Almeda Genoa Road range in frontage from 59 to approximately 75 feet. In depth, said lots abutting upon the north side of Almeda Genoa Road range from 105 feet to 220 feet. Additionally, Plaintiff owns 25 lots abutting upon the south side of Almeda Genoa Road. The great majority of these lots abutting upon the south side of Almeda Genoa Road each range in width of front footage from 121 feet to approximately 125 feet. The few remaining lots fronting on the south side of Almeda Genoa Road vary in front footage from approximately 127 feet to 168 feet. The depths of the respective 28 lots abutting on the south side of Almeda Genoa Road vary from approximately 107 feet to approximately 221 feet.

IV.

(a) During the year 1976 Defendant, the City of Houston, acting through its City Council, its governing body, did order that the portion of Almeda Genoa Road on which Plaintiff's said lots abut be converted into a four lane esplananed thoroughfare. Almeda Genoa Road to the East had been theretofore similarly converted and the instant project also provides for converting the said road in similar manner to the West.

(b) Upon information and belief, Plaintiff alleges this action was taken by the adoption of Ordinance No. 76-570 passed on April 7, 1976. No notice of this action was given to Plaintiff.

(c) Purporting to act under the statutory process and purported authority provided by Article 1105 b, Texas Revised Civil Statutes, Defendant gave notice of a "hearing" of the proposed assessments against Plaintiff's lots and against the owner thereof which notice did in fact reach Plaintiff. In particular, but without limitation, (although the notice did not in fact so state as required by Article 1105 b) the issues of special benefits to Plaintiff's lots and alleged enhanced value thereof were to be determined at this hearing.

(d) At such hearing provided pursuant to the above statute, January 5, 1977, the City Council of Defendant undertook to decide the issues there as provided for by the statutory procedure, including the purely fact issues of whether there were special benefits or enhanced values accruing to Plaintiff's lots by virtue of the said conversion of Almeda Genoa Road, and if so, how much.

(e) Upon information and belief Plaintiff alleges that no record of the proceedings before the City Council at such hearing was in fact made or kept by the Defendant City.

(f) There were no governing evidentiary rules utilized at such hearing to assure consideration by the City Council of only relevant, reliable, proper, and admissable evidence.

(g) At such hearing nothing was done to provide a basis for any subsequent review, judicial or otherwise, of the action of the Defendant's City Council.

(h) At such hearing there were no procedures utilized to assure that the decision of the City Council upon the purely factual issues was in fact based upon relevant, proper, reliable and admissable evidence actually presented before the City Council at the hearing.

(i) No procedures were utilized or available as to give any assurance that the City Council understood or applied or correctly applied any governing legal principles in reaching whatever conclusions it reached.

(j) In point of fact the Council discussed and considered and one or more of the members thereof gave consideration to certain utilities that it was stated before the hearing would become available at some time and related in some manner to the paving project, wl.ich was a legally improper consideration.

(k) In point of actual fact the Council also ignored the governing legal principle that special benefit and value enhancement, if any, was determinable as to each separate platted lot and gave consideration to the special circumstances of common ownership thereof by Plaintiff, which was legally improper.

(l) More in point as to the actual facts, the Council decided the fact issues of enhancement and special benefits based on contract costs and that whatever amount Plaintiff was not required to pay would have to be paid by the City of Houston.

(m) In point of fact, one or more or all members of the City Council received and considered evidence communicated outside the confines of the hearing, both before and after such hearing was opened and closed, and therefore not being subject to being rebutted, cross-examined, or explained, including but not limited to evidence, in fact erroneous, as to reports of negotiations between Plaintiff and an alleged prospective buyer of Plaintiff's lots, all of which was legally improper.

(n) In point of fact, the City Council did not require or hear sworn testimony in support of the amount of special benefits and the enchancements which have been determined, but by design in conducting what was considered merely a formal proforma compliance with the statutory requirement of notice and hearing relied upon the statements of a city called witness that he recommended to the Council it assess the property at the amount the City had theretofore proposed it be assessed, that is, the said witness for the City did not even undertake to testify that based on appraisal he had made a determination of amount of special benefits and enhancement.

(o) In other ways, such hearing was conducted whereby it was clear, convincing and obvious that the Council did not decide the purely fact issues of special benefits and enhancement based on rules as to consideration and weighing of evidence presented, which evidence would be admissable, legal, proper, relevant, and reliable, and presented at the hearing itself; in fact, it was clear, convincing and obvious that a majority of the Council present did not even know what its legal obligations were in deciding these fact questions, or if such legal obligations were known, did not observe them.

(p) The statutory procedure under said Article 1105 b contain no provisions or prescriptions which assured or assures to Plaintiff rights to which it is constitutionally entitled as specified in subparagraphs (a)-(i) inclusive above and in other portions of this Complaint and no provisions which would inhibit or prevent the occurrences, events and matters specified in subparagraphs (j)-(o) above and is unconstitutional, under the Fourteenth and Fifth Amendments of the United States Constitution, both on its face and in its implementation as to Plaintiff in this case, as

not providing even minimum safeguards assuring the minimum essentials of a hearing at which the fact issues here involved would be decided, even if the City Council of the City of Houston under the circumstances herein alleged be otherwise a competent tribunal to fix a money judgment and lien against Plaintiff and Plaintiff's property, which it will be shown hereinafter it is not.

V.

(a) On or about January 26, 1977, the Defendant City of Houston, by and through the action of its said governing body, and under the colorable process of law and colorable authority of said Article 1105b adopted Ordinance No. 77-180. By this ordinance, among other things, the City of Houston did assess 90% of the cost of what were the alleged public improvements to Almeda Genoa Road against Plaintiff's said lots abutting thereon as hereinabove described and against the Plaintiff as the owner thereof as a personal liability, all as contemplated by the said statutes, Article 1105b.

(b) As a result of the said undertakings of assessment by the Defendant, Plaintiff's unimproved lots abutting on Almeda Genoa Road have been assessed collectively in the total sum of in excess of $450,000.00 and Plaintiff has personally been assessed in this amount, with the assessment to be a personal liability of Plaintiff as provided for by the statute and ordinance and the amount thereof has been affixed as a first and superior lien against Plaintiff's lots.

(c) Article 1105b, and Ordinance No. 77-180 adopted pursuant thereto, on their fact and in their application to Plaintiff in this case, are in direct violation of due process of law secured to Plaintiff by the Fourteenth Amendment to the

United States Constitution, and a taking of Plaintiff's property without just compensation as provided in the Fifth Amendment to the United States Constitution, such prohibition of the Fifth Amendment being also a prohibition under the Fourteenth Amendment, the due process and equal protection of the laws provisions thereof. Plaintiff is being deprived of property by means of a settled statutory procedure among other things, denying the minimum fundamental essentials of due process of law and minimum essentials for assuring the equal protection of the laws and that citizens not be deprived of their property for a public purpose without just compensation.

VI.

The purported authority for the assessments of Plaintiff and Plaintiff's property, as alleged, lies in Article 1105 b of the Texas Revised Civil Statutes. The material provisions of said law as involved here are that no assessment shall be made against abutting property or its owner until "after notice and opportunity for hearing", that "no assessment shall be made against any abutting property or owners thereof in excess of the special benefits to such properties and its owners in the enhanced value thereof", that notice be given by newspaper advertisement and written notice to the property owner at least fifteen days before the date of the hearing, that the hearing "shall be by and before the governing body of such City and all owning any such abutting property, or any interest therein, shall have the right, at such hearing, to be heard on any matter as to which hearing is a constitutional prerequisite to the validity of any assessment authorized by this Act, and to contest the amount of the proposed assessment, the lien and liability thereof, with special benefits to the abutting properties and owners thereof by means of the improvements for which such assessments

are to be levied, the accuracy, sufficiency, regularity and validity of the proceedings and contract in connection with such improvement and proposed assessments," and that "anyone owning or claiming any property assessed who shall desire to contest any such assessment on account of the amount thereof, or any inaccuracy, irregularity, invalidity, or insufficiency of the proceedings or contract with reference thereto or with reference to such improvements shall have the right to appeal therefrom and from such hearing by instituting suit for that purpose in any court having jurisdiction, within fifteen days of the time such assessment is levied".

VII.

Additional to and cumulative of the patent and latent constitutional deficiencies hereinabove and hereinafter enumerated and the following:

(a) The statute has no provisions which give even minimum assurance that the hearing will be conducted so as to assure the property owner even the minimum essentials of a hearing based on the results of which the property owner is subjected to what is the legal equivalent of a judgment secured by a first and superior lien on property.

(b) The statute does not provide for the manner and method by which the findings on the purely fact issues are to be reviewed by the Court wherein the authorized suit is instituted.

(c) However, the Courts of Texas, including the Supreme Court of Texas, have engrafted upon and therefore made it by settled decisional law a part of the

statute that the "judicial review" will be in accordance with the unique and unusual "Texas Substantial Evidence Rule."

(d) The incorporation into the state statute by settled decisional law of the Substantial Evidence Rule deprives the Plaintiff here of a true judicial review of the Council findings as to special benefits and enhancements.

(e) Under the Rule, the Court gives no consideration to what occurred or what did not occur before the Council, which body is, however, under the Rule and process applied, the only tribunal provided by the state, judicial or otherwise, with power, authority and jurisdiction to find the facts as to special benefits or enhancement. There is no record made, or required to be made by law, of the hearing under settled Texas decisional law, and any record presented to the Court wherein the suit is instituted is considered excludable and inadmissable and irrelevant.

(f) The Court in which the suit is instituted has no power, jurisdiction or authority itself to determine the fact issues as to enhancement or special benefits.

(i) Under the said Texas Substantial Evidence Rule, there is no fact issue considered to be before the Court.

(ii) The only issue considered to be before the Court is considered to be one of law, whether there could have been presented to the Council, whether or not it was presented, "substantial evidence" affording reasonable support for the Council's findings. The Court makes this determination of

this law question based on evidence heard by it, and as alleged, without regard to whether the same evidence was heard by the City Council, and without regard to whether or not there was any relevant evidence before the City Council, and without regard to what matter or matters, if any, there were upon which the Council, as the trier of the facts relied.

(iii) Because there is considered under the Texas Substantial Evidence Rule to be no fact issue before the Court, no jury is permitted.

(iv) The Court by virtue of the express provisions of Article 1105 b does not have power, authority or jurisdiction to determine the amount, if any, of special benefits and enhancement, and may only either deny the Plaintiff any relief, or enter a judgment setting aside the levied assessments.

(v) Under the express provisions of the statute, if the Court should set aside the assessment proceeding, the City Council is authorized to commence, without limitation as to time for doing so, and without limitation as to the number of times it does do so, new assessment proceedings under Article 1105 b.

(g) The unique and peculiar result also is that no remedy by way of appeals to any State Appellate Court is provided to Plaintiff because if the Plaintiff prevails in the District Court in which the proceeding authorized by the statute is instituted, the Plaintiff's only relief will be a right to a "re-hearing" or repeated "re-hearings" before the Council. Thus, the Plaintiff is effectively

deprived of any opportunity to present its contentions and secure effective relief in respect of its said contentions within the State's court structure, including without limitation, Plaintiff's federal constitutional contentions.

(h) Although the statute contains the requirement of a "hearing", as applied, and in particular as applied with the engrafting onto the statute of the Texas Substantial Evidence Rule, the requirement becomes in actual result a nullity, or substantially a nullity, the result in actuality being only that there be a notice of a hearing given and perhaps that the Council conduct some kind of proceeding at the time specified which in the Council's sole and exclusive judgment constitutes a "hearing".

VIII.

The process to which Plaintiff has been subjected and will be subjected perforce the operation of the said statute, and particularly as such statute has been interpreted by settled Texas decisional law,

(a) Deprives the Plaintiff of due process of law guaranteed to Plaintiff by the Fourteenth Amendment,

(b) Deprives Plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment,

(c) Constitutes a taking of Plaintiff's property (money and/or its land) without just compensation as prohibited by the Fifth Amendment, a part of the Fourteenth Amendment by reason of the due process clause thereof,

(d) Is repugnant to fundamental constitutionally guaranteed concepts of justice, equity, fair play, and access to courts for the correction of grievances,

(e) Operates to deprive Plaintiff of guaranteed minimal essentials of a hearing before a tribunal with power and jurisdiction to render a final decision as to a purely fact issue, that is, of enhancement and special benefit, if any, and if there is enhancement or special benefit, the amount thereof, among others, the right to have the said fact issues determined based on some appropriate weight assigned to credible and proper evidence, the right to rebut unfavorable evidence, if there be any, the right of cross examination, the right to have fact findings made in accordance with governing legal principles, and the right to know what evidence was considered by the fact finding tribunal in reaching its findings and conclusions,

(f) Is deprived of the right not to have, and the right by means of judicial review to test whether same did or did not occur, the fact issues decided arbitrarily or capriciously, by biased fact finders, on inequitable or unjust grounds or indeed that said findings were not made fraudulently or what would be the legal equivalent of fraudulently.

IX.

The statute is unconstitutional in constituting the City Council of the City of Houston, its sole and exclusive governing body, the tribunal provided by the State, to decide the traditional and constitutional fact issues of enhancement and special benefits, at least there being present here an unconstitutional application of the statute and the proceedings which have been conducted pursuant thereto.

(a) The foundation prescribed by the statute for the levy of assessments against abutting land is essentially one reflecting the traditional notion of unjust enrichment, that is, assuming the authority of the City to make a decision in the interest of the City and its citizens generally to convert Almeda Genoa Road from an existing two-lane paved street into a four-lane esplanaded thoroughfare, the abutting land is required to reimburse the City to the amount that the abutting land is specially benefited or enhanced in value. No purer example of a fact issue traditionally vested as to its decision in a judicial tribunal could be found, such as is the case with the traditional vesting of authority in courts in the instance of condemnation of land for a public purpose of the decision as to the amount of money to which the owner thereof is entitled.

(b) The City Council before it came to consider these fact issues had already determined to undertake the project, to undertake it as an assessment project, to authorize the letting of a contract for the work, and that the work was in the public interest, that is, the Council had determined in pursuance of its purely political and legislative objectives that the project was of benefit to the City generally and its residents generally and a needed contribution to the arterial thoroughfare system of the City, all without notice to Plaintiff and all without Plaintiff's request, and indeed over Plaintiff's objections thereto voiced at the hearing.

(c) The cost of the entire Almeda Genoa Road project as it was represented to the City Council to be is $2,268,209.91. Of this amount it was proposed as represented to the City Council that $761,516.45 be assessed against abutting land and land owners. Of this

amount of $761,516.45 the amount of approximately $450,000.00 has been assessed against Plaintiff or Plaintiff's lots.

(d) The conversion of Almeda Genoa Road has been a project long publicly represented to the citizens of Houston as one to be undertaken by the City and as a priority project.

(e) The City through its Council had already converted the road from Gulf Freeway to Monroe Road to a four-lane esplanaded thoroughfare and had opened this section to traffic (Plaintiff's lots front on Almeda Genoa Road from Monroe Road to Ballantine Street).

(f) The City is limited by state law to assessments only against abutting land, regardless of the size, configuration, or useability of said land and it is statutory precluded from collecting for any special benefits and enhancement accruing to non-abutting land, notwithstanding the existence of such benefits and enhancement to such non-abutting land.

(g) Upon information and belief, Plaintiff alleges that no funds had been budgeted by the City of Houston or were available for use by the City of Houston for the payment of more than the amount which was represented to the Council to be the City's estimated portion of the total cost.

(h) Under the circumstances alleged in subparagraph (a)-(i) above, the members of the City Council could not be an unbiased tribunal to be invested with the power, authority and jurisdiction, or substantially final power, authority and jurisdiction, within the prescriptions of

the due process and equal protection clauses of the Fourteenth Amendment to determine the fact issues of the amount of enhancement and special benefits to Plaintiff's lots.

X.

This United States District Court is not deprived of jurisdiction under 28 U.S.C. 1341 (The Johnson Act) for the following reasons, singly and collectively —

(a) The assessments levied in this case are not a tax within the meaning of Section 1341.

(b) The Courts of the State of Texas, including the highest court of the State, have held such assessments not to be a tax, nor the levy thereof an exercise of the taxing power of the state or any subordinate branch or division thereof.

(c) The foundation for the levy of the assessments is, as hereinbefore alleged, that the landowner of abutting land is required to reimburse the public authority, the City in this instance, for the amount by which the public improvements are found to specially benefit or enhance the value of its land.

(d) For the reason herein alleged, with particular reference to the allegations contained in paragraph VII, there is no plain, speedy and efficient remedy available in the State Court to Plaintiff;

(e) More particularly as hereinbefore alleged, there is no remedy available in the courts of the State wherein Plaintiff can make, or can be reasonably assured of

making, a meaningful presentation of, and obtaining a meaningful decision upon its constitutional contentions contained herein.

XI.

If the court should decide to hold Article 1105 b unconstitutional generally, then Plaintiff alleges in the alternative that under the facts, conditions, events and circumstances herein alleged there has been an unconstitutional application and unconstitutional implementation of the statute as to Plaintiff in respect of the assessments which have been levied against Plaintiff and Plaintiff's land of which complaint is made herein.

XII.

Said Article 1105 b, and Ordinance No. 77-180 adopted under authority of said Article, are unconstitutional on their face, or have been given an unconstitutional application and unconstitutional implementation as to Plaintiff in that as reflected hereinabove and more particularly in paragraph IX, there is provided for by the statute and there has occurred here an unconstitutional confusion and merging of legislative, executive, and judicial functions, as a violation of separation of powers inherent in the federal and state constitutional systems and inherent in the principle of "federalism" and renders therefore unconstitutional and unconstitutional as to Plaintiff the processes and procedures hereinabove and hereinafter described with more particularity.

XIII.

Even if the Court should decline to hold unconstitutional said Article 1105 b, or hold there has not been an

unconstitutional application and implementation thereof as to Plaintiff in this instance, said assessments should be set aside and held for naught for the following reasons, taken singly and collectively,

(a) It is fact that three of the leading appraisors of land to be found in the City of Houston testified, after being engaged by Plaintiff to determine independently the amount of special benefits and enhancement, to a range thereof from $20-$25 per linear foot.

(b) Secondly, only one witness presented anything on behalf of the City and he did not give admissible testimony of an expert opinion as to enhancement and special benefits but only "testified" to a recommendation that the Council assess the amount which had been proposed and thereafter merely presented argument that his recommendation should be followed.

(c) All persons at the hearing, other than the said one city witness, including land owners and/or their representatives were opposed to the proposed assessments.

(d) Several such land owners or their representatives, unknown to Plaintiff or Plaintiff's witnesses prior to the hearing, two of whom testified they were themselves real estate brokers, testified they agreed with the appraisor witnesses who had been employed by Plaintiff.

(e) The assessments which have been levied are unlawful for the reasons hereinabove alleged in this paragraph XIII and the reasons hereinafter alleged in this XIII and for the reasons as alleged in paragraph IV hereof.

(f) Said assessments are grossly excessive and grossly in excess of any special benefits or enhanced value of Plaintiff's land.

(g) Said assessments are so grossly excessive and so grossly in excess of any special benefits or enhanced value so as to become constructively fraudulent and quasi fraudulent if not fraudulent in fact.

(h) Said assessments were not and cannot be reasonably supported by substantial evidence before the City Council, or obtainable substantial evidence.

(i) With particular reference in support thereof of the facts alleged in paragraph IX, the City Council was not a legally competent tribunal to determine and cannot become a legally competent tribunal to determine the facts as to enhancement and special benefits.

(j) The assessment determinations which have been made were made capriciously, arbitrarily, as a result of abuse of discretion, and in reckless disregard of the facts and in reckless disregard of Plaintiff's rights and of the duties of the Council colorably vested in it by Article 1105(b).

(k) The findings are on their face and beyond dispute capricious, arbitrary, made in abuse of discretion and made in reckless disregard of the facts and of Plaintiff's rights, and are on their face conflicting in that, as a particularized example, Plaintiff's Lot 1, Block 45, which contains approximately 17,914 square feet is being assessed $10,255.48 or approximately 60¢ a square foot whereas Plaintiff's Lot 10, Block 43 which contains 28,600 square feet is being assessed $7,382.34 or

approximately 23¢ a square foot. If the 60¢ a square foot which is the amount of the assessment against Lot 1, Block 45 were applied against Lot 10, Block 43, the amount of the assessment against Lot 10, Block 43 would be $17,160.00 instead of $7,382.34 whereas if the assessment equivalent to 23¢ a square foot which has been made against Lot 10, Block 43 were applied as to Plaintiff's smaller lot, Lot 1, Block 45, the assessment would be $4,000.00 instead of the assessed amount of $10,140.00. Each of the Plaintiff's said lots is affected to a greater or lesser degree by the principles inherent in the specified calculation.

(l) Uncontrovertedly, the sole or principal benefit of the conversion of Almeda Genoa Road into a four-lane esplanaded thoroughfare is to the City generally, to the improvements in the arterial traffic flow of the City, more particularly to all property geographically related to Almeda Genoa Road, whether or not abutting, and also more particularly the provisions apparently deemed needed by the city for a thoroughfare from the Gulf Freeway to Telephone Road (a principal major city thoroughfare) and thereafter on to the East of the said Telephone Road ultimately to connect the existing Gulf Freeway to a projected new freeway lying to the East of Telephone Road and the benefits, if any, to Plaintiff and to Plaintiff's property are only incidental.

(m) At the hearing on January 5, 1977, of which hearing all councilmen received prior notice, only five of the nine members of Council, counting the Mayor, were present for the entire hearing and heard all of the evidence. The hearing was closed on January 5. Thereafter, on January 26, 1977, with seven members present, only five of whom had been present at the

hearing to hear the evidence, six members voted for the assessments which have been levied, and one member voted against the assessments, the one voting against the assessments being one of the five councilmen present at the hearing, thus of the nine members of Council only four who were present at the hearing voted for the Ordinance levying such assessments.

IV.

(a) For the purpose of attempting to present on a bona fide basis the possible amounts of special benefits and enhancement, and on Plaintiff's assumption it would receive a bona fide hearing by the City Council, and notwithstanding Plaintiff's opposition to the entire project, Plaintiff has heretofore incurred expenses for attorneys' fees and appraisors in excess of $15,000.00.

(b) Plaintiff will necessarily incur additional such expenses in a presently undetermined but very large amount at whatever point Plaintiff becomes successful as a final matter in vindicating its constitutional rights and/or for other reasons invalidating the assessments.

(c) The Court has jurisdiction and power, both under its general equitable jurisdiction and its jurisdiction to provide complete relief for the violation of Plaintiff's constitutional rights, and vindication of Plaintiff's rights, to order the payment of Plaintiff's said expenses, in the amount they are ultimately determined to be particularly as a result of the facts and circumstances as are elsewhere herein alleged.

(d) The Court should under the facts as alleged in this case, exercise for the benefit of Plaintiff this power and authority as such is stated to be in the preceding subparagraph (c).

XV.

(a) The action of the City Council, taken without hearing on or about April 7, 1976, by Ordinance No. 76-570, had in and of itself the practical result of imposing a lien on Plaintiff's property since prospective buyers were at least from such date required to assume a lien to be imposed and imposed in a very large amount, if to any extent an undetermined amount.

(b) Thereafter, information was available and made available to the public generally, and the prospective buyers in particular that the assessments would be between $60-$70 per linear foot which had the effect of re-enforcing the practical effect of the impending assessment on Plaintiff's property and the effect of further establishing the probable amount which would be demanded.

(c) In fact officials of the Defendant City also informed and advised persons who requested information that the lien itself, or at least a notice of intention to file a lien, would be filed even before the holding of the assessment hearing.

(d) The Defendant has of the time of the filing hereof either completed the process by filing the lien, or if it has not done so, will do so shortly if not prevented from doing so by the order of this court.

(e) Plaintiff has already been irreparably damaged and will be further irreparably damaged if the Defendant is not prevented and enjoined from taking or conducting any further proceedings in connection with the Almeda Genoa Road assessment project and Plaintiff will continue to suffer and to sustain damage and in increasing amounts and the Plaintiff has no adequate remedy at law.

(f) More specifically but without limiting the foregoing subparagraph (e), Plaintiff will be damaged and additionally be damaged by the implementation of the colorable provisions of Article 1105 b authorizing new and repeated assessment hearings, unlimited as to time for the holding thereof, relief from which would be repeated additional suits to set same aside, and Plaintiff is entitled to the protective order of the court by way of injunction specifically and additionally restraining and enjoining any future assessment hearing or hearings by the Defendant City under the colorable authority of Article 1105 b.

XVI.

At the same hearing and by the same Ordinance the Defendant also made assessments against Plaintiff and Plaintiff's Lot 11, Block 43, and Lot 23, Block 48 for the widening and paving of the pre-existing improved Monroe Road. Said Lot 11, Block 43 was assessed an additional amount of $13,967.90, making the total assessment against it $21,778.99, or approximately 76¢ per square foot and Lot 23, Block 48 was assessed an additional amount of $13,967.00, making the total assessment against it $16,817.35 or approximately $2.67 per square foot. In addition Lot 23, Block 48 abuts on Monroe Road only 105.90′, although assessed for 217′ and Lot 11, Block 43 although abutting Monroe only 221.03′ was assessed for 230.991. All the allegations of this complaint apply with the same force and effect to the assessment of Plaintiff's property abutting Monroe Road as they do to Plaintiff's property abutting Almeda Genoa Road.

XVII.

(a) Supplementary of the allegations of subparagraph (b) of Paragraph IX hereof, when the Defendant's City Council

adopted Ordinance No. 76-570 on April 7, 1976, and caused same to be filed of record in the Deed Records of Harris County, Texas, the Council then and there decided and by such action (and the said filing thereof) made the decision which was carried into effect by Ordinance No 77-180, which was the equivalent of deciding the amount of assessments to be levied and the equivalent of burdening Plaintiff's lots with the lien therefor, the material contents of said Ordinance No. 76-570 established the intention and the decision of the Council to assess the maximum permitted under state law for curbs, gutters, and sidewalks (100%) and other alleged improvements (Paving) 90% and without reference to or limitation as to special benefits and enhancements.

(b) The said material portions of the said ordinance are as follows:

"Section 2. Within the following limits, a part of the cost of such improvements shall be paid by the City of Houston and a part thereof shall be paid by assessments against the abutting property:

1. Almeda-Genoa Road: From 17 feet east of east property line of Telephone Road, east to the end of the existing concrete pavement at a point 373.16 feet east of the east property line of Monroe Road.

2. Monroe Road: From 152.0 feet North of the North property line of Swiss Lane, North to a point 48.0 feet south of the south property line of Constellation Lane.

Said Assessments shall be on the following basis:

(a) The abutting property within the limits hereinabove defined and the real and true owners

thereof shall be assessed for and pay all of the costs of curbs, gutters and sidewalks in front of their respective properties and not exceeding nine-tenths (9/10) of the estimated cost of the remaining such improvements (in accordance with the estimate thereof by the Director of Public Works and Engineering, herein ordered to be made by him), exclusive, however, of the cost of such improvements within intersections of streets with other streets, avenues and alleys as so estimated; provided, however, that in no event shall the cost of said improvements to be paid by the abutting property and the real and true owners thereof exceed the total cost of curbs, gutters and sidewalks and nine-tenths (9/10) of the estimated cost of such improvements exclusive of curbs, gutters and sidewalks as so estimated by the Director of Public Works and Engineering.

(b) The City of Houston shall pay all of the remainder of said cost of said improvements after deducting the amounts herein specified to be paid by the abutting property and the real and true owners thereof as set out in subparagraph (a) above.

Section 3. The amounts payable by the abutting property and the real and true owners thereof shall be assessed against such property and the real and true owners thereof, shall constitute first and prior liens upon such abutting property and a personal liability of each such owner, and shall be payable to City of Houston, or assigns . . . ."

XVIII.

The said assessment ordinance states the owner of the lots to be Thelma P. Head and Joan M. Head, and in one instance J. G. Head, whereas in fact all said lots assessed in the name

of Thelma P. Head and Joan M. Head and J. G. Head are now owned and were as of the date of the adoption of the ordinance owned by Plaintiff Alnoa-G. Corporation.

WHEREFORE, Plaintiff prays —

(a) That the assessments levied against Plaintiff and Plaintiff's land, the ordinance levying same and all action taken in connection therewith or pursuant thereto and heretofore by the Defendant be set aside, void and held for naught as being taken in violation of the United States Constitution.

(b) If the Court shall decline, or find it unnecessary, to hold the statute and/or proceedings taken pursuant thereto to be in violation of the United States Constitution, that said assessments and all actions of Defendant heretofore taken in connection with the levy of assessments against Plaintiff and Plaintiff's land be nevertheless set aside, voided and held for naught upon the grounds, singly and collectively, as in this Complaint alleged.

(c) That this court at the trial hereof, render judgment based on the evidence as shall be presented at the trial hereof whether Plaintiff's land will be specially benefitted or enhanced and whether, and in what amount, said special benefits and enhancement, if any, are chargeable to Plaintiff under the applicable sustantive law as it is found by the Court to be.

(d) That Defendant, by preliminary injunction and thereafter by permanent injunction, be restrained and enjoined from any further and additional proceedings of any kind or character by way of assessing or attempting

to assess Plaintiff or Plaintiff's land for the cost or any portion of the cost of the improvements to Almeda Genoa Road, including without limitation, the implementation of any additional assessment proceedings under the colorable authority of Article 1105b except to the extent permitted or allowed by the court based on the de novo determination of the amounts, if any, legally chargeable to Plaintiff based on a judicial and constitutional determination of said amounts, if any.

(e) That the court order payment to Plaintiff of its reasonable attorneys' fees, heretofore incurred, and to be hereinafter incurred, and if necessary to make Plaintiff whole or substantially whole and award exemplary damages.

(f) For all other relief, at law or in equity, as to which Plaintiff shall show itself on the trial hereof to be justly entitled.

Respectfully submitted,

/s/ WILLIAM V. COUNTS

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/s/ WILLIAM A. OLSON

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APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

TEL 504—589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

OFFICE OF THE CLERK

FEBRUARY 6, 1978

Mr. William V. Counts
Attorney at Law
LANE, SAVAGE, COUNTS, & WINN
3330 Republic National Bank Bldg.
Dallas, Texas 75201

No. 77-2279

ALNOA G. CORP.

v.

CITY OF HOUSTON, TEXAS

Dear Counsel:

Under revised Rule 21 (1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari and, therefore, will not be routinely prepared by this office. 38 LW 3502.

A copy of the opinion judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

/s/ BRENDA M. HAUCK

Deputy Clerk

enclosures

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-2279
Summary Calendar

D. C. Docket No. CA-77-H-218

ALNOA G. CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,

versus

CITY OF HOUSTON, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

BEFORE GOLDBERG, CLARK AND FAY, CIRCUIT JUDGES.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHERFOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 23, 1977

ISSUED AS MANDATE: DECEMBER 30, 1977

In The United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 77-2279

ALNOA G. CORPORATION,
a Delaware Corporation,
Plaintiff-Appellant,

versus

CITY OF HOUSTON, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING
(December 22, 1977)

BEFORE GOLDBERG, CLARK, AND FAY, CIRCUIT JUDGES.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

H-77-218		CARL O. BUE, JR.	MAG. BLACK
DATE	NR.	PROCEEDINGS	
2-8-77	1.	Pltf's Original Complaint filed. (1) Summons Issued.	
		***	
	3.	Pltf's Interrogatories to Deft. filed	
		***	
5-9-77	5.	(NWB) MOTION CONFERENCE on Deft. Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim, filed.	
		1. Pltf. has sued City over special assessment for paving pleading lack of due process in assessment procedure and inadequacy of appeals process in state court. Motions and Briefs are to be filed. Deft. pleads 28 USC 1341.	
		2. As Magistrate reads Tramel v Schrader, 505 F. 2d 1310 (5th Cir. 1975), although that case was pleaded differently and the appeal based upon different points, the Court clearly stated that special street improvement assessments are taxes and that district courts may not restrain the assessment on collection of such taxes and, further, that there is an adequate remedy in Texas courts.	

H-77-218		CARL O. BUE, JR.	MAG. BLACK
DATE	NR.	PROCEEDINGS	
		3. Pltf. case should be dismissed.	
		EXCEPTED TO BY PLTF.	
5-9-77	6.	Dft. MOTION to Dismiss for Lack of Jurisdiction and MOTION to Dismiss for Failure to State a Claim, filed. (NWB conf. 5-9-77)	
		***	
5-9-77	11.	Pltf. MOTION to Require Deft. to Answer Complaint, filed. (NWB conf. 5-9-77)	
5-9-77	12.	Pltf. MOTION to Require Deft. to Answer Interrogs, filed. (NWB conf. 5-9-77)	
5-24-77	13.	(COB) MEMORANDUM AND ORDER. Deft's Motion to Dismiss GRANTED; based on want of jurisdiction over subj. matter & for failure to state a claim upon which relief may be granted. (MHE) A/n. BN	
		***	